

1 RONALD J. TENPAS
Assistant Attorney General
2 Environment and Natural Resources Division
United States Department of Justice
3 DAVID B. GLAZER (D.C. 400966; MD)
Natural Resources Section
4 Environment and Natural Resources Division
United States Department of Justice
5 301 Howard Street, Suite 1050
San Francisco, California 94105
6 Telephone: (415) 744-6491
Facsimile: (415) 744-6476
7 E-mail: david.glazer@usdoj.gov

8 Attorneys for the Federal Defendants
9
10
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16
17 SIERRA CLUB, WILDEARTH)
GUARDIANS, and ROCKY MOUNTAIN)
18 CLEAN AIR ACTION,)

19 Plaintiffs,)

20 v.)

21 U.S. DEPARTMENT OF THE INTERIOR)
and DIRK KEMPTHORNE,)

22 Defendants)
23

No. C-08-0850 VRW

DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR JUDGMENT ON
THE PLEADINGS

Date: August 28, 2008
Time: 2:30 p.m.
Courtroom No. 6

Hon. Vaughn R Walker

TABLE OF CONTENTS

NOTICE OF MOTION	1
POINTS AND AUTHORITIES	1
I. Statement of Issues	1
II. Statement of Facts	2
III. Argument	4
A. Standard of Review	4
B. Plaintiffs’ Claim of “Informational” Standing is an Insufficient Basis for this Court’s Jurisdiction	5
C. Plaintiffs Fail to Satisfy the Causation and Redressability Requirements of Standing	10
CONCLUSION	13

TABLE OF AUTHORITIES

Federal Cases

Center for Biological Diversity v. Brennan, 2007 U.S. Dist. LEXIS 65456, 2007 WL 2408901 (N.D. Cal. Aug. 21, 2007)	8
Bauer v. Texas, 341 F.3d 352 (5 th Cir. 2003)	1
Beeman v. TDI Managed Care Servs., Inc., 449 F.3d 1035 (9 th Cir. 2006)	9
Cetacean Cmty. v. Bush, 386 F.3d 1169 (9 th Cir. 2004)	4, 5
Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961 (9 th Cir. 2003)	7-9
DBSI/TRI IV Ltd. P’ship v. United States, 465 F.3d 1031 (9 th Cir. 2006)	1
Federal Election Commission v. Akins, 524 U.S. 11 (1998)	7-9
Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991)	7
Fund for Animals v. Norton, 295 F. Supp. 2d 1 (D.D.C. 2003)	9, 13
Guerrero v. Clinton, 157 F.3d 1190 (9 th Cir. 1998)	11, 12
Hartman v. Summers, 120 F.3d 157 (9 th Cir. 1997)	5
Longshoremen’s Union v. Boyd, 347 U.S. 222 (1954)	1
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	5, 6, 10-12
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)	7
Merchants Home Delivery Serv. v. Frank B. Hall & Co., 50 F.3d 1486 (9 th Cir. 1995)	4
Provenzano v. United States, 123 F. Supp. 2d 554 (S.D. Cal. 2000)	4
Rivas v. Rail Delivery Serv., 423 F.3d 1079 (9 th Cir. 2005)	5
Sierra Club v. Morton, 405 U.S. 727 (1972)	6
Smith v. National Steel & Shipbuilding Co., 125 F.3d 751 (9 th Cir. 1997)	4
Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83 (1998)	10, 11
Thornhill Pub. Co. v. General Tel. & Electronics Corp., 594 F.2d 730 (9 th Cir. 1979)	4
United States v. Hays, 515 U.S. 737 (1995)	5
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)	6
Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136 (9 th Cir. 2003)	4

Wilderness Soc’y v. Norton, 434 F.3d 584 (D.C. Cir. 2006) 11, 12

Federal Statutes

U.S. Const. Article III 1

Pub. L. No. 109-58, 119 Stat. 594 1, 3, 4

5 U.S.C. §§ 701–706 1

16 U.S.C. § 1539(c) 8

28 U.S.C. § 2201(a) 1

28 U.S.C. §§ 2201–2202 1

42 U.S.C. §§ 4321–4370f 7

Federal Rules

Fed. R. Civ. 12(b)(1) 1, 5

Fed. R. Civ. 12(c) 1, 4

Fed. R. Civ. 12(d) 4

Fed. R. Civ. 56 4

NOTICE OF MOTION

Defendants United States Department of the Interior and Dirk Kempthorne hereby serve notice that they will bring on for hearing a motion for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(b)(1) & (c). The motion is currently calendared to be heard by the Hon. Vaughn R Walker on August 28, 2008, at 2:30 p.m., in Courtroom No. 6.

The motion asks that judgment be entered for the defendants on plaintiffs' complaint because the plaintiffs lack standing to pursue their claims. In support of their motion, the defendants respectfully direct the Court's attention to the memorandum of points and authorities, below. A proposed order is also submitted herewith.

POINTS AND AUTHORITIES

I. Statement of Issues

Plaintiffs are the Sierra Club, WildEarth Guardians, and Rocky Mountain Clean Air Action. Their complaint [Dkt. #1] seeks review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706,^{1/} and includes only one claim for relief, based upon the alleged failure of the defendants to enter into an agreement with the National Academy of Sciences to conduct a study required by the Energy Policy Act of 2005 ("2005 Act"), Pub. L. No. 109-58, § 1811, 119 Stat. 594, 1126–27 (2005), concerning coal bed methane ("CBM") extraction, to make the completed study available to the public, and to submit a subsequent report to Congress.

Plaintiffs describe themselves as environmental organizations dedicated to preserving wildlife and public lands and to addressing what they perceive as environmental degradation. (Complaint ¶¶ 7–13.) They all claim active involvement in the CBM issue. (*Id.* ¶¶ 9, 11, 13.) However, plaintiffs have not alleged that they have or will suffer concrete, particularized injuries

^{1/} Plaintiffs also seek declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, but those statutory provisions do not change the standing analysis discussed below. Suits for declaratory judgment may not proceed in the absence of a concrete "case or controversy." *Longshoremen's Union v. Boyd*, 347 U.S. 222, 223–24 (1954). The "actual controversy" requirement of 28 U.S.C. § 2201(a) is identical to the "case or controversy" requirement of U.S. Const. Article III. *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003); *see also DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1039 (9th Cir. 2006) (court will not grant declaratory or injunctive relief where standing and ripeness under APA not found).

that are likely to be redressed by the relief sought; therefore, they lack standing to pursue their claims under Article III of the U.S. Constitution.

II. Statement of Facts

The 2005 Act is a wide-ranging statute requiring that many federal agencies with responsibility over energy matters undertake a variety of programs, regulatory activities, and studies. As it relates to plaintiffs' complaint, the 2005 Act provides as follows:

SEC. 1811. COAL BED METHANE STUDY.

(a) STUDY.-

(1) IN GENERAL. — The Secretary of the Interior, in consultation with the Administrator of the Environmental Protection Agency, shall enter into an arrangement under which the National Academy of Sciences shall conduct a study on the effect of coal bed natural gas production on surface and ground water resources, including ground water aquifers, in the States of Montana, Wyoming, Colorado, New Mexico, North Dakota, and Utah.

(2) MATTERS TO BE ADDRESSED. — The study shall address the effectiveness of —

(A) the management of coal bed methane produced water;

(B) the use of best management practices; and

(C) various production techniques for coal bed methane natural gas in minimizing impacts on water resources.

(b) DATA ANALYSIS. — The study shall analyze available hydrologic, geologic and water quality data, along with —

(1) production techniques, produced water management techniques, best management practices, and other factors that can mitigate effects of coal bed methane development;

(2) the costs associated with mitigation techniques;

(3) effects on surface or ground water resources, including drinking water, associated with surface or subsurface disposal of waters produced during extraction of coal bed methane; and

(4) any other significant effects on surface or ground water resources associated with production of coal bed methane.

(c) RECOMMENDATIONS. — The study shall analyze the effectiveness of current mitigation practices of coal bed methane produced water handling in relation to existing Federal and State laws and regulations, and make recommendations as to changes, if any, to Federal law necessary to address adverse impacts to surface or ground water resources associated with coal bed

methane development.

(d) COMPLETION OF STUDY. — The National Academy of Sciences shall submit the findings and recommendations of the study to the Secretary of the Interior and the Administrator of the Environmental Protection Agency within 12 months after the date of enactment of this Act, and shall upon completion make the results of the study available to the public.

(e) REPORT TO CONGRESS. — The Secretary of the Interior and the Administrator of the Environmental Protection Agency, after consulting with States, shall report to the Congress within 6 months after receiving the results of the study on-

(1) the findings and recommendations of the study;

(2) the agreement or disagreement of the Secretary of the Interior and the Administrator of the Environmental Protection Agency with each of its findings and recommendations; and

(3) any recommended changes in funding to address the effects of coal bed methane production on surface and ground water resources.

Id. § 1811, 119 Stat. at 1126–27. (*See* Complaint ¶ 23.)

Coal bed methane is a form of natural gas found in coal seams. (Complaint ¶ 19.) Its extraction requires that ground water in the coal seams be pump out. (*Id.*) The study and report to Congress required by the 2005 Act (the “Report”) is designed to explore the potential effects on surface and ground water resources from the extraction of coal bed methane and the resulting production and disposal of water from the extraction process.

Plaintiffs claim that their members

live, work, recreate, and study, and will continue to live, work, recreate and study in areas that are adversely affected by coal bed methane production or have been proposed for coal bed methane production or are hydrologically connected to areas where coal bed methane production is currently occurring or is proposed to occur.

(Complaint ¶ 14.) They further assert that the defendants’

failure to secure a report on the impacts of coal bed methane production on surface waters and ground waters . . . deprive[s] Plaintiffs and their members of information guaranteed to the public by the Energy Policy Act of 2005. Plaintiffs and their members are adversely affected by Defendants’ failure to make public this legally required information.

(*Id.* ¶ 15.) Finally, plaintiffs claim that

[i]f Plaintiffs and their members had this information, they would use it to further educate the public about the impacts of coal bed methane exploration and extrac-

tion. They would also use the information to advocate for adoption of measures to further reduce or mitigate the impacts of coal bed methane exploration and extraction. Defendants' failure to produce this information as required by the Energy Policy Act of 2005 deprives the Plaintiffs and their members of these benefits and thus causes them injury. Granting the requested relief would redress the injuries described above.

(*Id.* ¶ 16.) Read in the light most favorable to the plaintiffs, the complaint asserts only that the plaintiffs and their membership have been deprived of information that they might use for educational or advocacy purposes. They nowhere claim that they have suffered any concrete or particularized injuries that might be redressed by actions taken as a result of the Report — or even that the Report would necessarily result in any specific recommendations concerning actions that they might desire to see performed.

III. Argument

A. Standard of Review

Rule 12(c) of the Federal Rules of Civil Procedure provides for the expeditious disposition of claims after the close of the pleadings, but before trial.^{2/} “A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.” *Smith v. National Steel & Shipbuilding Co.*, 125 F.3d 751, 753 (9th Cir. 1997); *Merchants Home Delivery Serv. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995). Where the motion attacks the Court's subject matter jurisdiction, it will be granted when the allegations of the complaint, accepted as true, reveal that a court lacks subject matter jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003); *Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Provenzano v. United States*, 123 F. Supp. 2d 554, 557 (S.D. Cal. 2000). “A suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject matter jurisdiction over the suit.” *Cetacean Cmty. v. Bush*, 386 F.3d

^{2/} Where the Court considers matters outside the pleadings, the motion should be treated as a motion for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). Defendants at this juncture do not rely on matters outside the pleadings, but reserve their rights to challenge any such material offered by plaintiffs in response to this motion.

1 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101
 2 (1998)). Such a case should be dismissed under Fed. R. Civ. P. 12(b)(1). *Id.*

3 B. Plaintiffs' Claim of "Informational" Standing is an Insufficient Basis for this
 4 Court's Jurisdiction

5 The requirement that a plaintiff demonstrate its standing to pursue a claim in federal
 6 court arises from both the constitutional limitation on federal court jurisdiction to "cases or
 7 controversies" under Article III and from prudential considerations informing the proper exercise
 8 of federal judicial power. *See Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997). Like
 9 subject matter jurisdiction, standing cannot be waived. *Id.*; *United States v. Hays*, 515 U.S. 737,
 10 742 (1995).

11 [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has
 12 suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or
 13 imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
 challenged action of the defendant; and (3) it is likely, as opposed to merely
 speculative, that the injury will be redressed by a favorable decision.

14 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)
 15 (citation omitted); *Cetacean Cmty*, 386 F.3d at 1174; *see also Rivas v. Rail Delivery Serv.*,
 16 423 F.3d 1079, 1083 (9th Cir. 2005) (plaintiff must point to "some threatened or actual injury
 17 resulting from the putatively illegal action"). A plaintiff's standing cannot be premised upon
 18 merely speculative claims of injury. *Friends of the Earth, Inc.*, 528 U.S. at 181.

19 Nor can a plaintiff's standing be founded on alleged harm that amounts to no more than a
 20 disagreement with how the government is conducting its business of governing.

21 [A] plaintiff raising only a generally available grievance about government —
 22 claiming only harm to his and every citizen's interest in proper application of the
 23 Constitution and laws, and seeking relief that no more directly and tangibly
 benefits him than it does the public at large — does not state an Article III case or
 controversy.

24 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992). It does not matter that a plaintiff
 25 may claim a special interest in the subject matter of its suit; if the plaintiff alleges only that
 26 interest and not a real and particularized harm to its economic, recreational, aesthetic, or other
 27 concrete interests, it will lack standing.

[A] mere “interest in a problem,” no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization “adversely affected” or “aggrieved” within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation’s natural heritage from man’s depredations. But if a “special interest” in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide “special interest” organization, however small or short-lived. And if any group with a bona fide “special interest” could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972).

In addition to the constitutional requirements of Article III, courts have developed a set of prudential considerations that limit standing in federal court to prevent a plaintiff “from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances’ pervasively shared and most appropriately addressed in the representative branches.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)). To that end, “the plaintiff’s complaint must fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” *Valley Forge*, 454 U.S. at 475 (quoting *Ass’n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

As noted above, the injury asserted by plaintiffs is purely “informational” and stems from the government’s alleged failure to provide them with information (as yet undeveloped) that they might some time in the future, they assert, put to good use in educational or advocacy activities. Such an injury, without more, is insufficient to confer standing. The Supreme Court has rejected the view that any citizen can sue to enforce government adherence to statutory requirements in the absence of a concrete injury to that person.^{3/} *Defenders of Wildlife*, 504 U.S. at 572–73. And before *Defenders of Wildlife* was handed down, the D.C. Circuit similarly rejected the

^{3/} Although plaintiffs claim that their members engage in activities in areas affected or potentially affected by CBM production (Complaint ¶ 14), they do not connect those allegations to the informational injury they allege — an injury that conceivably could be suffered by any member of the public anywhere in the United States.

1 notion of “informational” standing. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C.
 2 Cir. 1991). In reaching that decision, the court noted the circular nature of an “informational”
 3 standing theory: if the “injury” is the lack of information “caused” by the defendant’s failure to
 4 provide it, then it can be theoretically “redressed” by ordering the agency to provide the informa-
 5 tion sought. But in that case, the standing requirement of Article III jurisdiction is all but
 6 eliminated in environmental cases, except perhaps for the very “foolish” organization that did
 7 not claim that it desired the information in question for any reason relating to the environment.
 8 *Lyng*, 943 F.2d at 84–85. Moreover, the court observed, any such injury could be claimed by
 9 any member of the public and would arise on a daily basis, whenever a member of the public
 10 asserted that the government was failing to provide information that he or she would like to
 11 have. *Id.* at 85. That, too, would eviscerate the standing requirement.

12 Significantly, *Lyng* relied on a case handed down the previous year, *Lujan v. National*
 13 *Wildlife Federation*, 497 U.S. 871 (1990), in which the Supreme Court held, among other things,
 14 that a plaintiff does not have the right to seek review under the APA of an agency’s failure to
 15 prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act
 16 (“NEPA”), 42 U.S.C. §§ 4321–4370f, in the absence of a triggering governmental action apart
 17 from “day-to-day” operations. *Lyng*, 943 F.2d at 85–86 (citing *Nat’l Wildlife Fed’n*, 497 U.S. at
 18 898–99). In so holding, the *National Wildlife Federation* Court rejected the notion of “informa-
 19 tional” injury standing alone. 497 U.S. at 898–99.

20 Indeed, no decision of which defendants are aware has conferred standing on a plaintiff
 21 to seek redress for a purely informational injury. In all cases in which “informational” injury
 22 was alleged, other factors existed that distinguish those cases from one asserting purely
 23 “informational” standing. In *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the
 24 statute sued under contained specific enforcement provisions that could be invoked by a citizen
 25 seeking to acquire the information whose production was required by law. *Id.* at 16, 18, 20. In
 26 *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961 (9th Cir. 2003), the plaintiffs
 27 objected to their inability to participate in an administrative rulemaking process, which resulted
 28

1 in the promulgation of regulations that they asserted adversely affected their aesthetic and
 2 recreational interests. *Id.* at 970–72. Similarly, in *Center for Biological Diversity v. Brennan*,
 3 No. 06-cv-7062 SBA, 2007 U.S. Dist. LEXIS 65456, at *9–27, 2007 WL 2408901, at *3–10
 4 (N.D. Cal. Aug. 21, 2007), the Court premised its finding of injury-in-fact upon the statutorily
 5 guaranteed opportunities for public comment and participation that the plaintiffs alleged they had
 6 been improperly denied.

7 *Brennan*, in fact, is quite similar to a case decided recently by this Court, *Cary v. Hall*,
 8 No. 06-cv-4363 VRW, 2006 U.S. Dist. LEXIS 78573^{4/} (N.D. Cal. Sep. 30, 2006) (Walker, C.J.),
 9 in which the Court reached a decision that is very instructive for this case. In *Cary*, the plaintiffs
 10 challenged a decision by the U.S. Fish and Wildlife Service allowing, among other things, the
 11 export or re-import of a species of otherwise protected antelope. Among other things, the
 12 plaintiffs claimed an “informational” injury in being denied certain information and the
 13 concomitant opportunity for public participation that would have been afforded if the Agency
 14 had complied with the permit process that plaintiffs asserted was required under section 10(c) of
 15 the Endangered Species Act (“ESA”), 16 U.S.C. § 1539(c). In finding that this claim adequately
 16 presented an “informational” injury, the Court held that section 10(c) of the ESA afforded a
 17 statutory right to public comment and participation sufficient to support standing. 2006 U.S.
 18 Dist. LEXIS 78573, at *25–34. At the same time, however, the Court noted that “information
 19 for information’s sake” was insufficient to satisfy the “zone of interests” requirement of
 20 prudential standing doctrine, *id.* at 32, and (while not reaching the issue), observed that it was
 21 unclear whether plaintiffs would have standing to pursue their additional challenge to the
 22 Agency’s failure to publish the findings under ESA § 10(d) associated with the grant of a permit
 23 or exemption under section 10(c). 2006 U.S. Dist. LEXIS 78573, at *34. The Court expressed
 24 doubt that, in the absence of a statutory authorization to sue under section 10(d), the publication
 25 requirements of that provision gave rise to any interest other than “a general interest in agency
 26 compliance with statutory requirements.” *Id.* In that connection, the Court cited *Akins*, 524 U.S.

27 ^{4/} No Westlaw citation appears to be available for this case.
 28

1 at 19–20, 25, holding that Congress may provide for standing through a statutory citizen’s suit
 2 provision. Tellingly, in this case, Congress has not chosen to provide that statutory avenue of
 3 relief.^{5/}

4 In this case, plaintiffs base their claim on a statute that provides no more than that the
 5 Department of the Interior shall undertake to have a report prepared for Congress’s own use.
 6 Significantly, when the Report is completed, it is to be provided to Interior and to the Environ-
 7 mental Protection Agency (“EPA”), and those agencies are then to provide Congress with their
 8 analysis of the Report at the time the Report is forwarded to the legislature. 2005 Act § 1811(d),
 9 (e). And although Interior and EPA are to consult with the States, *id.* § 1811(e), the Act does not
 10 require the Agencies to solicit or consider public comment. Nor does the Act contain a citizen’s
 11 suit provision or any other enforcement mechanism. In short, the text of the Act makes it clear
 12 that its purpose is to provide Congress with information that Congress may or may not use in
 13 future deliberations; it is not to provide members of the public any right to information,
 14 participation, or to have any specific actions undertaken in the future. And while the Act recites
 15 that the Report may be made “available to the public,” 2005 Act § 1811(d), that is insufficient to
 16 create a right that plaintiffs would have standing to vindicate. Numerous government documents
 17 are “available to the public”; *without more*, members of the public do not have standing to sue
 18 regarding the subject matters of such documents. *See Fund for Animals v. Norton*, 295 F. Supp.
 19 2d 1, 8–9 (D.D.C. 2003) (where statute does not entitle plaintiffs to notice and comment,

21 ^{5/} In *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035 (9th Cir. 2006), the Ninth
 22 Circuit held that, where a California statute expressly provided for a judicial remedy to the class
 23 of persons to which the plaintiffs belonged, the plaintiffs have standing to seek relief for the
 24 alleged denial of information that the statute required the defendants to provide. *Id.* at 1038
 25 (citing *Citizens for Better Forestry*, 341 F.3d at 969). In that case, plaintiff pharmacies sued
 26 under a California law requiring that prescription drug intermediaries conduct or provide for a
 27 study that could be used to assess reimbursement rates, and providing that an aggrieved
 28 pharmacy has standing to sue for violations of that law. In deciding *Beeman*, the court noted the
 requirement that, for Article III standing purposes, the plaintiffs must identify some “threatened
 concrete interest” that the law’s procedures were designed to protect, but found that the phar-
 macies’ economic interest in the rate-setting question was sufficient. *Id.* at 1039–40. The case
 does not stand for the proposition that an informational injury, *without more*, is sufficient to
 confer standing, but rather that the legislature *may* under certain circumstances confer rights on
 citizens that they may then enforce in court.

1 plaintiffs cannot assert “informational” injury alone).

2 “Vindicating the *public* interest (including the public interest in Government observance
3 of the Constitution and laws) is the function of Congress and the Chief Executive.” *Defenders of*
4 *Wildlife*, 504 U.S. at 576 (emphasis in original). For that reason, it is within the province of
5 Congress to ensure that Interior provides it the information called for by the 2005 Act. Members
6 of the public, even those living in the six Western states where CBM extraction may take place,
7 have no special rights to champion Congress’s interest.

8 C. Plaintiffs Fail to Satisfy the Causation and Redressability Requirements of
9 Standing

10 As noted above, plaintiffs point out that they live, work, and recreate in areas in which
11 CBM extraction may take place, areas consisting of six Western states: Montana, Wyoming,
12 Colorado, New Mexico, North Dakota, and Utah. (Complaint ¶ 14.) *See* 2005 Act § 1811(a)(1).
13 However, plaintiffs do not assert any particular non-informational or environmental injury on the
14 basis of which the Court could find standing. Plaintiffs do not attempt to suggest that, if the
15 Report were prepared and forwarded to Congress, Congress would enact legislation or otherwise
16 undertake any action that would alter the lives of plaintiffs’ membership in any way for the
17 better. To assert such a claim, of course, would be to engage in sheer speculation. While
18 Congress presumably had a purpose in requesting preparation of the Report, the substance of that
19 report and its recommendations, if any, are entirely unknown at this point. Moreover, Congress
20 is free to act on the Report, to reject it, or to do nothing at all. Indeed, Congress could, on the
21 basis of the Report’s recommendations, enact legislation that plaintiffs may oppose. In short,
22 whatever inchoate environmental injury could possibly be read into the complaint,^{6/} no such
23 injury would seem causally related to the action challenged by plaintiffs’ complaint and, so,
24 would not be redressed by a ruling in plaintiffs’ favor.

27 ^{6/} Of course, it is not the Court’s function to supply injuries where plaintiffs have not pled
28 them. *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 108–09 (1998).

1 Where an insufficient causal link exists between the agency action challenged and the
 2 injuries alleged by a plaintiff, that plaintiff lacks standing to bring its claim. *Defenders of*
 3 *Wildlife*, 504 U.S. at 563. Similarly, where the remedy sought will not redress the injury alleged,
 4 standing will not be found. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 103–04 (1998).
 5 Where the plaintiff challenges “the legality of government action or inaction” addressed to
 6 someone other than the plaintiff himself, “causation and redressability ordinarily hinge on the
 7 response of the regulated (or regulable) third party to the government action or inaction — and
 8 perhaps on the response of others as well.” *Defenders of Wildlife*, 504 U.S. at 561–62. “Thus,
 9 when the plaintiff is not himself the object of the government action or inaction he challenges,
 10 standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Id.* at
 11 562 (citations omitted).

12 In a case strikingly similar to this one, a plaintiff organization challenged, among other
 13 things, the alleged failure of the National Park Service to conduct wilderness assessments,
 14 forward proposed wilderness designations to the President, and to map existing wilderness
 15 boundaries. *The Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006). As to these claims,
 16 the D.C. Circuit found that the plaintiff lacked standing because it did not assert an injury that
 17 would likely be redressed by a favorable ruling. *Id.* at 590–94. In so holding, the court noted
 18 that, as in this case, Congress would ultimately be free to reject any recommendations received,
 19 and indeed the President would be free to decide to propose none. *Id.* at 591, 593. In addition,
 20 with respect to the alleged failure to map wilderness boundaries, the court found it merely
 21 “speculative” that third-party activities would be curtailed by that undertaking. 434 F.3d at 592
 22 (quoting *Defenders of Wildlife*, 504 U.S. at 561). In this case, of course, neither Interior nor
 23 Congress is undertaking CBM extraction; those activities are conducted by third parties who
 24 may or may not be subject to regulations that plaintiffs may like to see enacted in the future.

25 *Wilderness Society* cited with approval the Ninth Circuit’s decision in *Guerrero v.*
 26 *Clinton*, 157 F.3d 1190, 1191 (9th Cir. 1998), holding that “‘where reports [to Congress] them-
 27 selves trigger no legal consequences,’ any injury allegedly incurred by the absence of reporting
 28

1 ‘is . . . not redressable.’” *Wilderness Soc’y*, 434 F.3d at 591 (quoting *Guerrero*, 157 F.3d at
 2 1191). In *Guerrero*, the plaintiffs, representatives of the governments of Guam, the Mariana
 3 Islands, and the State of Hawaiï, sued for the Interior Department’s failure to timely produce
 4 annual reports required by an act of Congress and concerning a free trade compact with the
 5 governments of Micronesia and the Marshall Islands. The plaintiffs asserted that they had a right
 6 to the information to be contained in the reports, which they believed was relevant to their
 7 competitive position as against the economies of those other territories. Although the court
 8 ultimately focused on the fact that plaintiffs’ claim boiled down to a challenge to the adequacy of
 9 the reports in question, rather than the complete failure to produce them, the court observed that
 10 “the report is simply a document submitted to Congress that Congress has no obligation to
 11 consider, let alone act upon.” 157 F.3d at 1194. And if Congress decided it did not get what it
 12 wanted from the Agency, Congress would be “in the best position” to follow up. *Id.* at 1195.
 13 That is precisely the situation presented in this case.

14 Again, this Court’s prior decision in *Cary v. Hall* is instructive. In ruling on plaintiffs’
 15 standing in that case, this Court addressed plaintiffs’ additional claim that the exemption from
 16 otherwise governing protections, applicable only to captive-bred domestic populations of the
 17 antelope, could encourage hunting of wild populations of the animals abroad. As to this claim,
 18 the Court accepted that the plaintiffs’ declarant, a researcher who asserted that he worked with
 19 wild populations of the antelope overseas, had asserted a sufficient “injury,” albeit at “the
 20 outmost limit of plausibility.” 2006 U.S. Dist. LEXIS 78573, at *12 (quoting Justice Scalia in
 21 *Defenders of Wildlife*, 504 U.S. at 566–67). However, the Court went on to hold that the
 22 plaintiffs had not demonstrated a causal nexus between that alleged injury and the challenged
 23 exemption, holding that any link between the hunting of captive-bred animals (allowed under the
 24 exemption) and the poaching of animals in the wild (about which plaintiffs expressed concern)
 25 was “anemic,” *id.* at *16, “too speculative and relie[d] on the unfettered decisions of third
 26 parties.” *Id.* at *20. In this case, even assuming that plaintiffs’ complaint could be read to raise
 27 the specter of injury from particular CBM extraction operations in particular areas, the nexus
 28

1 between any such injuries and a report to Congress that may contain recommendations of
 2 completely unknown import (and on which Congress need not act) is more than simply “anemic”
 3 — it is ectoplasmic.

4 Moreover, this Court found in *Cary* that any such injury was unlikely to be redressed by
 5 a ruling in plaintiffs’ favor. *Id.* at *20–23 (citing *Fund for Animals v. Norton*, 295 F. Supp.2d 1
 6 (D.D.C. 2003)). That is so, the Court quite properly reasoned, because a favorable ruling by the
 7 Court would at most make illegal the domestic hunting of captive-bred animals, which would
 8 have little bearing on hunting wild animals overseas. *Id.* In this case, too, even if the Court were
 9 to order immediate preparation of the Report, the Report may or may not contain recommenda-
 10 tions on which plaintiffs agree, Congress may or may not adopt any of those recommendations,
 11 and the recommendations may or may not yield the effects desired by the plaintiffs. For that
 12 reason, plaintiffs’ claim utterly fails the causation and redressability requirements of standing
 13 doctrine.^{2/}

14 CONCLUSION

15 For the reasons set forth above, Defendants respectfully request that the Court grant their
 16 motion for judgment and enter judgment in their favor, dismissing plaintiffs’ complaint with
 17 prejudice. A proposed order granting that relief is submitted herewith.

18
 19
 20 Dated: May 30, 2008

Respectfully submitted,

21 RONALD J. TENPAS
 22 Assistant Attorney General
 23 Environment and Natural Resources Division
 24 United States Department of Justice

25
 26
 27 ^{2/} Because, as argued above, the 2005 Act confers no rights at all on the public, it is not
 28 necessary to analyze whether plaintiffs’ claim falls within any “zone of interests,” because there
 are no cognizable interests as to which the plaintiffs could claim injury.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/David B. Glazer
DAVID B. GLAZER
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
Telephone: (415) 744-6491
Facsimile: (415) 744-6476
E-mail: david.glazer@usdoj.gov

Attorneys for the Federal Defendants

OF COUNSEL

Richard McNeer
Attorney Advisor
Office of the Solicitor
U.S. Department of the Interior

1 RONALD J. TENPAS
Assistant Attorney General
2 Environment and Natural Resources Division
United States Department of Justice
3 DAVID B. GLAZER (D.C. 400966; MD)
Natural Resources Section
4 Environment and Natural Resources Division
United States Department of Justice
5 301 Howard Street, Suite 1050
San Francisco, California 94105
6 Telephone: (415) 744-6491
Facsimile: (415) 744-6476
7 E-mail: david.glazer@usdoj.gov

8 Attorneys for the Federal Defendants
9
10
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16
17 SIERRA CLUB, WILDEARTH
GUARDIANS, and ROCKY MOUNTAIN
18 CLEAN AIR ACTION,

19 Plaintiffs,

20 v.

21 U.S. DEPARTMENT OF THE INTERIOR
and DIRK KEMPTHORNE,

22 Defendants
23

) No. C-08-0850 VRW

) [PROPOSED] ORDER GRANTING THE
) FEDERAL DEFENDANTS' MOTION
) FOR JUDGMENT ON THE PLEADINGS

) Date: August 28, 2008
) Time: 2:30 p.m.
) Courtroom No. 6

) Hon. Vaughn R Walker
24
25
26
27
28

1 Upon consideration of the Federal Defendants' Motion for Judgment on the Pleadings, it
2 is hereby ORDERED that the motion is GRANTED, that judgment is ENTERED in Defendants'
3 favor, and that this action is DISMISSED with prejudice.

4
5
6 IT IS SO ORDERED.

7
8
9
10
11 Dated: _____

VAUGHN R WALKER
CHIEF JUDGE
UNITED STATES DISTRICT COURT